

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1, SUBREGION 34

PROSPECT ECHN, INC.

Employer

and

AFT CONNECTICUT

Petitioner

Case No. 01-RC-229103

DECISION AND DIRECTION OF ELECTION

The Employer, Prospect ECHN, Inc., operates several medical care facilities and health care providers, including Rockville General Hospital, an acute care hospital located at 31 Union Street, Vernon, Connecticut. Petitioner AFT Connecticut seeks to represent a unit of about 185 full time, regular part-time, and per diem service and maintenance employees of the Employer in the following job classifications at Rockville General Hospital: Administrative Secretary, Secretary II, Cardiac Secretary, Clerical Nurses Assistant II, Clerical Nurses Assistant III, Cook II, Diet Aide I, Diet Aide II, Diet Technician, Health Information Management Specialist I, Health Information Management Specialist II, Health Information Management Specialist III, Senior Health Information Management Specialist, Housekeeper I, Housekeeper II, Housekeeper III, Lab Aide, Nursing Assistant, Nutrition Assistant, Patient Access Associate, Phlebotomist, Phlebotomist II, Rehab Aide, Sales Associate, Surgical Assistant, Switchboard Operator, Central Scheduler, Lead Perioperative Scheduler and Billing Associate, Team Lead, and Unit Secretary.¹

The Employer stipulates that the above-described unit would be appropriate if *and only if* all “per diem” employees are excluded. The Employer argues that per diem employees lack a community of interest with their full-time and regularly scheduled part-time coworkers because of differences in pay, benefits, scheduling practices, and employee turnover. The Employer also argues that the bargaining history between the Union and the Employer regarding employees at another facility militates against inclusion of the per diem employees. Accordingly, the Employer argues that per diem employees should be excluded from the unit.

A hearing officer of the Board held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. Prior to the hearing the Employer submitted a Statement of Position. As explained below, based on the record and the relevant Board law, I find that the petitioned-for unit is appropriate.

¹ The following are excluded from the petitioned-for unit, according to the parties’ stipulation: All other employees, professional employees, physicians, registered nurses, business office clerical employees, skilled maintenance employees, technical employees, confidential employees, managerial employees, and guards and supervisors as defined in the Act.

The Employer's Operations & Use of Per Diem Employees

As an acute care hospital, Rockville General Hospital (the "Hospital") provides medical care to the ill and injured 24 hours per day, seven days per week. Employees in the petitioned-for unit generally work in three shifts: 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11 p.m., and 11:00 p.m. to 7:00 a.m. According to Jennifer Marchese, the Employer's Associate Director of Human Resources and its sole witness at the hearing, the Employer employs between 500 and 1,000 employees at the Hospital, depending on patient census. There are about 30 job titles in the petitioned-for bargaining unit, performing a variety of duties necessary for the clean, safe and efficient operation of the Hospital. Although most of the unit consists of full-time and regularly scheduled part-time employees, approximately 38 of the employees in the petitioned-for unit are classified as "per diem" employees. The Employer's *Human Resources Policies & Procedures* manual provides the following definitions for full-time, part-time, and per diem employees:

Full-Time: An employee is classified as full time when employed to serve for an indefinite period of time in a position that is budgeted for thirty-five (35) or more regularly scheduled hours per week

Part-Time: An employee is classified as part time when employed to serve for an indefinite period of time in a position that is budgeted for less than an average of thirty-five (35) regularly scheduled hours per work week in one or more departments.

Per Diem – an employee is classified as Per Diem when working on an as needed basis without commitment to regular budgeted hours.

The Employer does not dispute that per diem, full-time and part-time employees who share the same job titles have identical skills, qualifications, job duties and working conditions. Specifically, when comparing per diem employees with full-time and part-time employees in the same job titles, it is undisputed that:

- The Employer uses the same standards when hiring per diem employees as it does when hiring full-time and part-time employees;
- Per diem employees receive the same training as the full-time and part-time employees;
- Per diem employees have the same job duties and responsibilities, and perform the same work as the full-time and part-time employees;
- Per diem employees work side-by-side, and even in teams, with full-time and part-time employees, communicating and helping each other throughout their shifts;
- Per diem employees use the same break rooms and rest areas that full-time and part-time employees use;
- Per diem employees report to the same supervisors as the full-time and part-time employees; and
- Per diem employees undergo the same yearly performance evaluations, from the same supervisors, as the full-time and part-time employees.

Despite these commonalities the Employer contends that per diems must be excluded from the bargaining unit because of differences in scheduling practices, pay, benefits, employee turnover,

as well as the bargaining history between the Union and the Employer. Each of these issues will be discussed in turn below.

Employee Scheduling

Per diem employees are scheduled differently than full-time and part-time employees. Marchese testified that each department's manager is responsible for posting their department's schedule. The schedules are posted two to four weeks in advance, and are posted either electronically or on a bulletin board in the department. According to Marchese, per diem employees are not "prescheduled": while full-time and part-time employees are on the schedules when the schedules are first posted, per diem employees are not. If there are any open shifts on the schedule, part-time employees are offered the first opportunity to pick up those shifts. If the Employer is unable to fill the schedule after offering the open shifts to part-time employees, the department managers ask per diem employees to fill in.² Per diem employees are allowed to decline work without risking corrective action. When the Employer needs to reduce staffing on a particular day or shift (e.g. due to low census), after exhausting volunteers and cancelling any temporary agency employees, the Employer cancels shifts for per diem employees before cancelling shifts for full-time or part-time employees.³ When cancelling shifts for full-time and part-time employees, the Employer selects employees by reverse-seniority on a rotating basis. But according to Marchese, seniority plays no such role for per diem employees.

Although the procedures for scheduling per diem employees differ in some respects from the full-time and part-time employees, the evidence shows that a significant number of per diem employees work a significant number of hours at the Hospital. Carol Parker, a per diem phlebotomist at the Hospital since September 2006, testified that she has regularly worked Saturdays and Sundays for years, and has regularly seen her name printed on her department's schedule for Saturdays and Sundays for at least the past year. In the 13 weekly pay periods from July 2 to September 30, 2018, Parker worked a total of 307.5 hours, averaging nearly 23.7 hours per week. Nine other per diem employees worked over 200 hours in that same 13-week period. Collectively, the per diem employees averaged over 360 hours worked per week during that time.

Employee Pay and Benefits

Per diem employees do not have access to many of the fringe benefits that the Employer offers to full-time and part-time employees. With respect to medical benefits, full-time and part-time employees are eligible to participate in five different health insurance plans offered by the Employer.⁴ Employees classified as per diem, however, are ineligible for four of those five medical plans, regardless of their number of hours worked. Per diem employees who work 30 hours per week over the previous 12 months are eligible for only one of the Employer's five

² Marchese did not testify as to how long managers wait after the schedule has been posted before asking per diem employees to pick up shifts.

³ According to Marchese, the Employer generally does not use agency employees to staff service and maintenance positions.

⁴ Employees must be budgeted to work 30 hours per week to be eligible for "full-time" medical benefits. Employees budgeted for 20-29 hours per week are eligible for "part-time" medical benefits. It appears that the only differences in the "full-time" and "part-time" benefits are the costs to the employee.

health plans, the “Value Plan.” According to Marchese, although the Value Plan is offered to all employees, only per diem employees have enrolled in it.⁵

Beyond medical insurance, the Employer offers a number of other benefits. Subject to certain minimum hours requirements, full-time and part-time employees are offered dental insurance, short-term disability insurance, long-term disability insurance, accidental death and dismemberment insurance, life insurance, paid leave, and Illness Bank Time (i.e. sick leave). According to Marchese, however, per diem employees are not eligible for any of these benefits, regardless of their hours worked.

With respect to wages, Marchese testified in abstract terms that per diem employees’ wages are determined by comparison to “the market” and are “maybe about 5 percent” higher than the wages of full-time and part-time employees in the same job titles. This additional amount is intended to both incentivize per diem employees to pick up shifts and to make up for their lack of benefits. Per diem employees do not receive yearly raises, although the Employer does annually review the per diem wages in relation to the market, and may make adjustments based on that review. Sometimes this may have resulted in increases for some of the per diems, although Marchese did not provide details regarding the specific timing and amounts of these increases. By contrast, full-time and part-time employees are eligible for yearly raises when offered, although the Employer does not necessarily give raises every year.⁶

Employee Turnover

The Employer also contends that there is a high degree of turnover with the per diem employees that is not present with the full-time and part-time employees. At the hearing, Marchese testified that turnover among the per diem employees was “about 46 percent.” However, there is no evidence in the record to corroborate this testimony. Although the Employer’s Exhibit 2 shows the “Most Recent Hire Date” for per diem employees, it does not provide any information regarding voluntary or involuntary employee terminations. In light of Marchese’s testimony that the total number of employees at the Hospital can fluctuate between 500 and 1000, it does not necessarily follow that each recently hired per diem employee means that another per diem employee has left the Employer. Moreover, the record reveals no evidence regarding the turnover rate(s) among the full-time or part-time employees in the petitioned-for unit, so a meaningful comparison is impossible under these circumstances.

Bargaining History

At the hearing, the Employer introduced a collective-bargaining agreement (CBA) between the Employer and the Union for a bargaining unit of service and maintenance employees at another facility: Manchester Memorial Hospital in Manchester, Connecticut. That unit includes about 300 employees. Under the recognition clause of that CBA, per diem employees are excluded from the bargaining unit. The CBA also provides that per diem employees who work 1,000 hours or more in a year can be transferred to part-time status.

⁵ But for the Affordable Care Act, the Employer would not offer any medical benefits to the per diem employees, according to Marchese.

⁶ The Employer has given yearly raises to full-time and part-time employees in the past two years, but did not give such raises three years ago. There is no evidence in the record regarding raises prior to that time.

There is a bargaining unit of registered nurses (RNs) at Rockville General Hospital. Although a copy of the applicable CBA was not entered into evidence at the hearing, Marchese testified that per diem RNs are included in that unit.

Appropriate Unit

In determining the appropriate unit placement of employees who work less than full-time, the Board distinguishes “regular” part-time employees from truly “casual” or irregular part-time employees. Whether they are labeled as “per diem,” “on call,” “extras,” or “spares,” the Board evaluates whether those employees perform unit work with sufficient regularity to share a community of interest with the other employees in the proposed bargaining unit. *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981). In *Newton-Wellesley Hospital*, 219 NLRB 699 (1975), on-call RNs performed the same work as full-time and part-time RNs, in the same areas of the hospital and under the same supervision. Although they did not work under a pre-arranged schedule, a substantial number of the on-call RNs worked on a “regular” basis during the relevant pay periods. *Id.*, 219 NLRB at 703. Thus, the Board concluded that the on-call RNs shared a “strong community of interest” with the other RNs, despite the fact that they did not share in their employer’s fringe benefit program. *Id.*

In cases where the parties do not agree on a formula for voter eligibility for per diem or casual employees, the Board traditionally uses what is referred to as the *Davison-Paxon* formula, absent a showing of special circumstances. *Davison-Paxon Co.*, 185 NLRB 21 (1970); *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 295 (1992). Specifically, the Board has found that employees who average at least four hours of work per week, and who perform the same work under the same supervision as other employees, share a sufficient community of interest with those employees to warrant their inclusion in a proposed bargaining unit with them. *Id.*, 185 NLRB at 23-24. The Board has consistently applied the *Davison-Paxon* formula to “on call” employees in the health care field. *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990)(four-hour *Davison-Paxon* standard applied to on-call RNs); *Northern California Visiting Nurses Assn.*, 299 NLRB 980 (1990)(same); *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 (1994)(same).

The Per-Diem Employees Share a Community of Interest

Based on the foregoing and the record as a whole, I find that the per diem employees at issue share a community of interest with their full-time and part-time co-workers that warrants their inclusion in the petitioned-for unit. It is undisputed that they have the same skills, training, qualifications, and perform the job duties as the full-time and part-time employees in the same job titles. They work at the same location, under common supervision, and have regular work-related contacts. The record also establishes that per diem employees as a group have indeed worked for the Employer on a “regular,” ongoing basis, and that the per diems clearly have an expectation of continued employment at the Hospital. Therefore, any per diem employee who worked on average at least four hours per week for the 13 weeks immediately preceding this decision is eligible to vote in this election.

I find that the issues raised by the Employer, individually and as a whole, do not merit exclusion of the per diem employees from the unit. The differences in scheduling upon which the Employer relies are inherent in the status of per diem employees and are very similar to the schedules worked by per-diem employees in other cases where the Board has included them with full-time and regularly scheduled part-time employees. *Trump Taj Mahal Casino Resort*, supra,

306 NLRB at 295; *Mid-Jefferson County Hospital*, supra, 259 NLRB at 832. The Employer argues that per diem employees' ineligibility for almost all of the benefits offered to other employees justifies their exclusion, but differences in per diem employees' benefits are not unusual and the Board has routinely held that such differences in fringe benefits are an insufficient basis to exclude per diem employees from a bargaining unit. See, e.g. *Newton-Wellesley Hospital*, supra, 219 NLRB 699; *Tri-State Transportation*, supra, 289 NLRB at 357. I find that the record evidence regarding per diem employees' wages is vague and does not require their exclusion from the unit *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1257 (2001); *L. Fatato, Inc.*, 87 NLRB 546, 548 (1949). Furthermore, the slight differences in wages described by the Employer do not sufficiently distinguish the per diems from their full-time and regularly scheduled part time colleagues to justify their exclusion from the unit. Moreover, the record evidence of employee turnover is inconclusive at best, and therefore does not detract from the other factors establishing a community of interest between the per diem, full-time, and part-time employees. *Vindicator Printing Co.*, 146 NLRB 871, 878 (1964).

Finally, I find that the Employer's argument regarding the parties' bargaining history does not weigh against inclusion of the per diems because it relies on a bargaining unit of employees who work at another hospital and who are not at issue in this proceeding. *Big Y Foods, Inc.*, 238 NLRB 855, 857 (1978).

In sum, based on all of the foregoing, I conclude that per diem employees who work with sufficient regularity in the same positions set forth in the petitioned-for unit in the petitioned-for unit work share a sufficient community of interest to be included in the same bargaining unit with the petitioned-for full-time and other part-time employees. I will therefore include them in the appropriate unit, as directed below.

Voter Eligibility

The record evidence shows no special circumstances warranting departure from the traditional *Davison-Paxon* formula, and the Employer has proposed no alternative calculation. Therefore, all per diem employees working in any of the agreed-upon positions⁷ set forth in the unit description who have not been terminated for cause or voluntarily quit and who have worked an average of least four hours during the quarter immediately preceding the date of this Decision and Direction of Election are eligible to vote in this directed election.

Conclusion

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

⁷ Administrative Secretary, Secretary II, Cardiac Secretary, Clerical Nurses Assistant II, Clerical Nurses Assistant III, Cook II, Diet Aide I, Diet Aide II, Diet Technician, Health Information Management Specialist I, Health Information Management Specialist II, Health Information Management Specialist III, Senior Health Information Management Specialist, Housekeeper I, Housekeeper II, Housekeeper III, Lab Aide, Nursing Assistant, Nutrition Assistant, Patient Access Associate, Phlebotomist, Phlebotomist II, Rehab Aide, Sales Associate, Surgical Assistant, Switchboard Operator, Central Scheduler, Lead Perioperative Scheduler and Billing Associate, Team Lead, and Unit Secretary.

2. The Employer is engaged in commerce within the meaning of the Act.⁸
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.⁹
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I direct an election for those employees, who constitute an appropriate unit for collective bargaining:

Included: All full-time, regular part-time, and per diem¹⁰ service and maintenance employees of the Employer in the following job classifications at Rockville General Hospital: Administrative Secretary, Secretary II, Cardiac Secretary, Clerical Nurses Assistant II, Clerical Nurses Assistant III, Cook II, Diet Aide I, Diet Aide II, Diet Technician, Health Information Management Specialist I, Health Information Management Specialist II, Health Information Management Specialist III, Senior Health Information Management Specialist, Housekeeper I, Housekeeper II, Housekeeper III, Lab Aide, Nursing Assistant, Nutrition Assistant, Patient Access Associate, Phlebotomist, Phlebotomist II, Rehab Aide, Sales Associate, Surgical Assistant, Switchboard Operator, Central Scheduler, Lead Perioperative Scheduler and Billing Associate, Team Lead, and Unit Secretary.

Excluded: Professional employees, physicians, registered nurses, business office clerical employees, skilled maintenance employees, technical employees, confidential employees, managerial employees, and guards and supervisors as defined in the Act, and all other employees,

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by AFT CONNECTICUT.

A. Election Details

The election will be held on **Wednesday, November 14, 2018** from **6:00 a.m. to 8:00 a.m. and 2:00 p.m. to 4:00 p.m.** in the Employer's board room located in Rockville General Hospital, at 31 Union Street, Vernon, Connecticut.

⁸ The parties stipulated as such.

⁹ The parties stipulated as such.

¹⁰ Any per diem employee who worked an average of at least four hours a week in the 13 weeks immediately preceding this decision is eligible to vote in this election

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **October 27, 2018**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **November 5, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. on the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: November 1, 2018

/s/ Paul J. Murphy

PAUL J. MURPHY
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 1, SUBREGION 34

